

January 5, 2005

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON CODE ENFORCEMENT APPEAL

SUBJECT: Department of Development and Environmental Services File No. **E0400454**

LLEW JOHNSON
Code Enforcement Appeal

Location: 8909 Northeast 118th Place, Kirkland

Appellants: Llew Johnson and Nancy Hatcher, *represented by*
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Intervenors: Angie and Jerrett Mentink, *represented by*
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King County: Department of Development and Environmental Services,
Current Planning Section, *represented by* **Sherie Sabour**
and Code Enforcement Section, *represented by* **Brenda Wood**
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And

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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	December 16, 2004
Hearing Closed:	December 21, 2004

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS OF FACT:

1. On August 10, 2004 the King County Department of Development and Environmental Services denied a variance application for Llew Johnson to approve setback reductions necessary to legalize an existing residential outbuilding located at 8909 Northeast 118th Place, Kirkland. On the same date, DDES also issued a notice and order revoking building permit B02M2125 applicable to the same structure. The variance denial concluded that the relief requested was not the minimum necessary based on the existence of available alternative locations not requiring the same setback reductions; that strict application of code requirements would not create an unnecessary hardship or deprive the subject property of rights and privileges enjoyed by other owners in the vicinity; and that steep slope requirements also precluded approving a variance in this location. The notice and order canceling the building permit is based on the provisions of KCC 23.24.100.A.3 authorizing revocation of a permit issued in error or "on the basis of materially incorrect information supplied to the county." Mr. Johnson has filed timely appeals of both the variance decision and the notice and order, and the two appeal proceedings were consolidated for review within a single hearing.
2. A pre-hearing conference on the consolidated appeals was held on September 23, 2004, at which time the owners of neighboring property to the west, Angie and Jerrett Mentink, were admitted to the proceeding as intervenors. The Examiner also allowed the variance application to be modified to include a steep slope setback reduction request to be supported by a supplemental geotechnical study. The Appellant has modified his variance proposal to include relocation of the western wall of the existing outbuilding to a location 5 feet from the adjacent property line.
3. Llew Johnson and Nancy Hatcher purchased the property located at 8909 Northeast 118th Place in 2000 and proceeded to obtain county permits for the removal of an older existing residence and its replacement with a new house in generally the same location. The property sits on the side of Goat Hill overlooking Juanita Bay to the south and slopes to the south at angles both above and below 40%. In general, properties within this section of 118th Place tend to have greater than 40% slopes east of the Johnson residence and less than 40% slopes to the west.
4. The question of whether the slopes on the Johnson property actually exceed 40% has never been precisely determined, but the operating assumption has been that approximately the southern 1/3 of the parcel is constrained by 40% slopes. On that assumption both the older Johnson residence

and its newer replacement impinge upon the standard regulatory steep slope buffer. But since the older home was a non-conforming structure that was being replaced by a building with only a modestly larger footprint, the zoning code allows such replacement to occur as a permitted use based on the older structure's grandfathered status.

5. KCC 21A.24.060.A.2 authorizes the replacement of a single-family dwelling constructed before 1990 within a steep slope hazard area if the new structure does not increase the existing footprint of the old structure by more than 1,000 square feet, and the intrusion of the new structure into the sensitive area or its buffer is not increased. Neither the new Johnson residence nor the adjacent slope area has ever been surveyed, and the new building's precise location on the lot and its footprint area vary from drawing to drawing within the record. It is a reasonable generalization, however, to conclude that the new footprint of the replacement Johnson residence appears to occupy no more than 700 square feet of the 1,000 square feet of bonus area authorized by KCC 21A.24.060.A.2. Thus it appears that a 300 square foot attached garage could have been approved in 2001 as part of the partial exemption from steep slope requirements authorized for the replacement residence.
6. Be that as it may, at the time of residence replacement no new garage was built, the old garage in the property's northwest corner continued to be used for storage and shop purposes, and the Johnson residence was served (as it is now) by on-site open parking in front of the house.
7. In 2002 Mr. Johnson began to make plans to replace the existing garage, which appears to have been constructed sometime in the 1930's and had become largely dilapidated. As it existed in 2002, the northeast corner of the old garage extended into the Northeast 118th Place right-of-way at least 7 feet, and its northwest corner was nearly flush with the western lot boundary. In this location the old garage extended into the right-of-way, violated the current street setback and the interior setback requirement as well. In the summer of 2002 Mr. Johnson obtained special use permit no. S-89-02 from the King County Property Services Division authorizing him to retain the existing structural intrusion into the right-of-way. As an existing legal non-conforming structure, the garage was allowed by the zoning code to be reconstructed in its existing location within the street and side yard setbacks.
8. Mr. Johnson, through his architect, obtained a building permit on December 20, 2002 (file no. B02M2125) to replace the old garage. The construction permit contains on its face the following notations: "Replace existing w/identical" and "demolish existing garage and replace with identical". These same notations appear on an application acknowledgement issued November 26, 2002 and are documented within the computerized log for the building permit within a comment that reads: "agent states there will be no expansion of existing non-conforming structure in footprint or in height". A later statement in the computerized log notes for this permit application dated December 13, 2002 reiterates that the "proposal is in the same footprint as existing garage". Finally, the Applicant's building permit site plan contains a notation that reads "proposed replacement of existing garage".
9. The building permit plans that were approved by the county depict a structure that has a larger footprint than the old garage to be demolished. The old garage measured 12 by 18 feet for a total floor area of 216 square feet, while the footprint depicted in the building permit plans measured 42% larger at 14 by 22 feet, or 308 square feet. In addition, the old garage had its garage door on the north side facing the street while the new garage plan proposed (according to Mr. Johnson, at DDES's insistence) a garage door on the south side. A curious aspect of the building permit

plans is that they show retaining walls on the south side of the new structure but depict no driveway connection from the garage door to the roadway.

10. A great deal of hearing testimony focused on why the garage door was moved to the south side of the building, why there was no driveway depicted, and describing Mr. Johnson's analytical process in eventually deciding that a south side garage door entrance was not a practical option. In reality, however, the entire garage door and driveway discussion is a red herring because the structure that Mr. Johnson actually built was not a garage at all. There is no garage door installed on either the north or south sides. The structure is at best a shop building with a storage area, or at worst an accessory dwelling unit.
11. Moreover, the new outbuilding was even larger than depicted on the building permit plans. According to Intervenor Mentinks's survey the new foundation measures 23.7 feet by 15.25 feet for a floor area of approximately 361 square feet. This foundation footprint area is 17% larger than the design approved within the building permit and 67% larger than the original garage that it replaced.
12. The new outbuilding now also contains an overhanging second story with view windows toward Lake Washington and a floor area of about 426 square feet, to which is appended a deck that increases the total second story floor area to 526 square feet. In addition, above the second story is a third story loft which increases the building's height some 7 to 10 feet above the elevation represented in the building permit plans. And finally the enlarged building footprint has been shifted some 7 to 10 feet south so that it now is entirely outside of the right-of-way but about 16 feet closer to the steep slope edge.
13. Overall, Mr. Johnson's revisionist history of the garage construction process appears to be a creative blend of fiction and fact. The findings in this report do not accord much weight to his story and are derived primarily from the documentary record.
14. The discrepancies between the building permit drawings and the actual building under construction were not identified by building inspector Rick White until after the foundation inspection had occurred and a framing inspection had been requested. Mr. White issued a correction notice to Mr. Johnson on May 2, 2003 requiring DDES approval of plan revisions before any additional construction could occur. On May 19, 2003 he posted the site with a stop work order. It is agreed that Mr. Johnson has not violated this stop work order.

CONCLUSIONS:

1. KCC 23.24.100.A.3 allows the DDES director to revoke a building permit issued "on the basis of materially incorrect information supplied to the county". This standard does not require an analysis of the state of mind of a property owner but simply a determination that the structure being built substantially deviates from the structure authorized by the permit.
2. With respect to non-conforming structures, KCC 21A.32.065.A.1 allows a non-conforming building to be expanded through the code compliance process with an increase of up to 10% in each of the following areas: building square footage, impervious surface, parking, and building height.

3. The expectation regarding a minor permitted expansion of a non-conforming structure is that the plans to expand would be divulged at building permit review, not after the fact in defense of a cited permitting deviation. Be that as it may, it is clear that the outbuilding constructed by Mr. Johnson exceeds in floor area by more than 10% both the original nonconforming garage structure and the building plans approved by the county. The structure also exceeds by more than 10% the height approved within the building plans.
4. Modifications to a legal non-conforming structure can only be approved pursuant to KCC 21A.32.055 if the modification does not “expand any existing non-conformance” or “create a new type of non-conformance”. Mr. Johnson’s outbuilding violates both of these requirements. It created a linear expansion of the existing sideyard setback intrusion by increasing it at the foundation level from 18 feet to 24 feet, and it created a new type of non-conformance because it pushed the building footprint south into the regulatory steep slope buffer.
5. Failure to disclose at the time of building permit application the expansion of a non-conforming structure in excess of the limitations permitted under KCC Chapter 21A.32 constituted the submittal of materially incorrect information to the county within the meaning of KCC 23.24.100.A.3 and warrants the revocation of the building permit. Accordingly the notice and order revoking the building permit must be upheld and Mr. Johnson’s appeal denied.

DECISION:

The appeal is DENIED.

ORDER:

1. The Appellant shall demolish the structure built under authority of building permit B02M215 in violation of its requirements and remove the demolition debris from the property by April 30, 2005. If this deadline is not met, DDES may assess penalties against the Appellant and his property retroactive to the date of this order.
2. Pursuant to KCC 23.36.020, enforcement of a notice and order is stayed during the pendency of an administrative appeal. KCC 21A.32.045 provides that a non-conforming structure that has been removed from the site cannot be reconstructed more than 12 months after its removal. Based on these provisions, the Appellant may submit a new building permit application to reconstruct the previously existing non-conforming garage, provided that a complete application therefor is submitted to DDES within 12 months of the date of this order. The non-conforming garage shall be deemed abandoned and discontinued 12 months after the date of this order if such building permit application has not been submitted.

ORDERED this 5th day of January, 2005.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 5th day of January, 2005, via certified mail to the following parties:

W. Theodore Vander Wel, Attorney at Law
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TRANSMITTED this 5th day of January, 2005, to the following parties and interested persons of record:

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NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision.

MINUTES OF THE DECEMBER 16 & 21, 2004, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NOS. L03VA013 & E0400454.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Sherie Sabour, Brenda Wood, Cass Newell, Ken Dinsmore, Greg Wessel and Rick White, representing the Department; W. Theodore Vander Wel, representing the Appellant; David S. Mann, representing the Intervenor; and Llew Johnson, James H. Strange, Jr., Shorty Mehrer, Angie Mentink and Tim Slotta.

The following Exhibits were offered and entered into the record:

- Exhibit No. 1 DDES File No. L03VA013
- Exhibit No. 2 DDES Code Enforcement Report to the Hearing Examiner for E0400454
 - Attachment 2 – Notice of Violation for E0400454
 - Attachment 3 – Notice and Statement of Appeal for E0400454
 - Attachment 4 – Copies of Code Sections Cited in the Notice and Order
 - Attachment 5 – Construction Permit; Permit Number B02M2125
 - Attachment 6 – Zoning Variance Report and Decision dated August 10, 2004
- Exhibit No. 3 Assessor's Map; Section 30, Township 26, Range 5
- Exhibit No. 4 Copies of the site plan, Geo-tech notes and intake information (7 pages) from Building Permit File B00L1266
- Exhibit No. 5 King County Codes regarding nonconformance
- Exhibit No. 6 Comments dated October 15, 2004
- Exhibit No. 7 Site Map submitted by Llew Johnson
- Exhibit No. 8 Large Site Map/Notations made by Llew Johnson
- Exhibit No. 9 Large depiction of the lot with the house & proposed garage; prepared by Mrs. Johnson
- Exhibit No. 10 Building drawings
- Exhibit No. 11 Letter to Sherie Sabour from Llew Johnson dated March 5, 2004
- Exhibit No. 12 Photograph of old garage
- Exhibit No. 13 Photograph of the retaining wall built between the Johnson property and the Mentink property
- Exhibit No. 14 Three drawings showing slope angles
- Exhibit No. 15 James H. Strange, Jr. resume
- Exhibit No. 16 Letter to Llew Johnson c/o Mehrer Construction from Geotech Consultants, Inc. dated December 11, 2000; Re: Geotechnical Engineering Study
- Exhibit No. 17 Letter to Llew Johnson from Geotech Consultants, Inc. dated October 1, 2004; Re: Steep Slope Setback Concerns
- Exhibit No. 18 Photographs (5) of Johnson's old garage taken by Angie Mentink sometime in 2002
- Exhibit No. 19 Photographs (9, a-i) of Johnson's new garage
- Exhibit No. 20 Colored Sheet showing the different properties
- Exhibit No. 21 Photographs (12) of other homes in the neighborhood taken by Angie Mentink
- Exhibit No. 22 Letter to Mrs. & Mrs. Mentink from Timothy Slotta dated November 18, 2004; Re: Geotechnical Construction Evaluation with an aerial photo
- Exhibit No. 23 Inspection Log by Rick White of DDES dated January 2003
- Exhibit No. 24 Inspection Notice/Correction Sheet by Rick White of DDES dated May 2, 2003
- Exhibit No. 25 Photograph showing the new building

The following exhibits were offered and entered into the record on December 21, 2004:

- Exhibit No. 26 Notice on Title Requirements – 1

Exhibit No. 27 Statement of Encroachment and Acknowledgement of County Interest

Exhibit No. 28 Photos (2) of old garage taken December 3, 2000

SLS:gao

E0400454 RPT